IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 204 OF 2000

M/s. House of Furniture Makers,
A Partnership Firm duly constituted
and registered under the Partnership
Act 1932, having its Office at Plot
No.1 (Area 2), Tivim Industrial Estate,
Caraswado, Mapusa, and through its
Partner Shri Narendra Ramnath Alornekar
alias Halankar, major, married,
businessman, residing at Colvale,
Bardez, Goa. .... Appellants

VERSUS

1. M/s. Goa Electronics Limited,
a Company constituted and
incorporated under the Companies
Act, 1956 and having its
Registered Office at Mapusa Industrial
Estate, Mapusa, Bardez, Goa.

2. The Economic Development Corporation
of Goa, Daman and Diu Limited,
a Company incorporated and
constituted under the Companies
Act, 1956 having its Registered
Office at EDC House, Dr. Atmaram
Borkar Road, Panaji, Goa. .... Respondents.

Shri S.G. Dessai, Senior Advocate with Shri M. Shirodkar, Advocate for the Apppellants.

Shri E. Furtado, Advocate for the Respondent No.1.

Ms. P. Bharne, Advocate for the Respondent No.2.

CORAM: P. V. HARDAS &
N. A. BRITTO, JJ.

DATE: **16TH AUGUST,2004**

ORAL JUDGMENT: (PER BRITTO, J.)

The plaintiffs' suit for specific performance of the contract and in the alternative for damages, having been dismissed by the learned Civil Judge, Senior Division, Panaji, by his judgment/decree dated 6.7.2000, the plaintiffs have filed the present appeal against the same.

2. At the time of hearing of arguments, Shri S.G. Dessai, the learned senior counsel, on behalf of the plaintiffs, has submitted, though belatedly, that there was no privity of contract between the plaintiffs and the defendant no.2. That stand was also taken by defendant no.2 in the written statement and regarding which Issue no.4 was raised by the learned Trial Court and answered in the negative against the plaintiffs. The plaintiffs' suit therefore has got to be dismissed as against defendant no.2, with costs.

3. Some facts are required to be stated to dispose of the present appeal.

4. The plaintiffs are a firm engaged in the business of manufacturing of furniture, wooden cabinets for T.V. Sets, etc. The defendant no.1 is a Government Company engaged in the manufacture of T.V. Sets and the defendant no.1 had been placing orders with different suppliers for the manufacture of wooden cabinets required for the said T.V. Sets. The defendant no.1 by virtue of a public notice published on Navhind Times dated 25.4.1987 invited sealed tenders from manufacturers for the supply of T.V. Wooden cabinets at an estimated cost of Rs.36,00,000 per annum. The parties were required to obtain the tender schedule along with specifications from the

Materials Department of defendant no.1 on payment of tender cost of Rs.10/-. The tender was required to reach the office of defendant no.1 by 2.00 p.m. On 2.5.1987 and the tenders were to be opened on the same day in the presence of the tenderors or their representatives. The defendant no.1 reserved its right to accept or reject any or all tenders without assigning any reason whatsoever.

5. Pursuant to the said notice the plaintiffs wrote a letter dated 2.5.1987 to defendant no.1 (Exh.PW.1/E) quoting the price of Rs.392.23 per cabinet as per their sample drawing . The plaintiffs in the said letter stated that no sales tax would be charged and door delivery at the factory of defendant No.1 at Mapusa would be given. The defendant No.1 also stated that the payment must be made within thirty days from the date of delivery and further stated that they hoped that the plaintiffs would find the said rate satisfactory and that they were looking forward to the pleasure of their orders. The plaintiffs further stated that the rate could be negotiated.

6. Thereafter, the plaintiffs appear to have collected a copy of the terms and conditions of the tender which have been produced by the plaintiffs. As per the said terms, it was inter alia stipulated that variation in price would not be permitted till the period of contract/supply allotted. It was further stipulated that in case the tenderor failed to supply the items as per the supply schedule and forfeited the offer, alternate procurement action would be taken at the tenderor's risk and cost. The tenderor was also to execute a Bank Guarantee for the amount which ought to remain valid till the expiry of the contract and that deliveries would be stipulated by the plaintiffs and would be

strictly as per their schedule.

7. Thereafter the defendant No.1 wrote a letter to the plaintiffs dated 19.5.87 informing them that their requirement would not be around 1000 to 1200 numbers of T.V. Cabinets per month and that by considering the other parties they would be in a position to place an order with the plaintiffs for about 600 cabinets per month. The defendant no.1 also informed the plaintiffs that the approximate rate may be Rs.380/- per cabinet.

8. By another letter dated 30.6.1987 written by the plaintiffs to defendant no.1 the plaintiffs accepted to supply cabinets at the rate of Rs.389.55 (Exh.PW.1/H) and further stated that they hoped that defendant no.1 would place the order for the cabinets with them. The defendant no.1 then wrote a letter dated 4.7.1987 accepting the rate of Rs.389.55 per cabinet and further informed the plaintiffs to inform them how much time they would require to obtain a Central Excise License.

9. Thereafter it appears that the defendant no.1 placed an order for the supply of wooden reception counter and some other items which order was successfully completed by the plaintiffs.

10. The first order, though dated 17.6.87 was placed with the plaintiffs by defendant No.1 for 925 cabinets at the cost of about Rs.3,60,333.75 in July, 1987.

11. It is relevant to note that for completion of this Order the defendant no.1 furnished certain material required for the said cabinets, mentioned in the purchase order itself. The second order was placed on 4.11.87 for 600 cabinets at the rate of Rs.108.18 per cabinet. The third order was placed on 28.12.87 for 450 cabinets at the rate of Rs.389.55. The fourth order was placed on 20.2.88 for the supply of 800 cabinets.

12. Thereafter there appears to have been a dispute between the plaintiffs and defendant no.1 regarding the engagement of some workers by the plaintiffs from M/s. Saishiv Wood, being one of the suppliers of cabinets to defendant no.1 which fact was not kindly taken by the defendant no.1 and by letter dated 14.12.87 the defendant no.1 told the plaintiffs that they should not engage any man power from other units supplying units to defendant no.1.

13. By letter dated 3.3.1988 the defendant no.1 informed the plaintiffs that they would be placing an order for 100 cabinets and further informed the plaintiffs not to procure raw materials for the manufacture of cabinets other than required for the manufacture of the orders mentioned by them.

14. By letter dated 20.1.88 the defendant no.1 informed the plaintiffs that five cabinets were rejected by them due to manufacturing defects, etc. Defendant No.1 informed the plaintiffs that they were compelled to inform the plaintiffs about it because the plaintiffs had earlier procured raw materials without having orders for making cabinets from defendant no.1.

15. Having realised that no more orders were forthcoming from defendant no.1, the plaintiffs sought the intervention of defendant no.2 as well as the Chief Minister and thereafter the plaintiffs approached the Defendant no.1 with a request to buy the raw materials in order to mitigate the plaintiffs' damages sometime in July, 1988. Consequently the raw materials as well as some finished and semi-finished products were handed over to defendant no.1 and defendant no.1 paid for the same.

16. However, it was the case of the plaintiffs that there were still some other raw materials lying with the plaintiffs which defendant No.1 purchased in the sum of Rs.66,000/- in September, 1988 but did not pay for the same. It was also the case of the plaintiffs that defendant No.1 rejected some of the raw materials which they had earlier agreed to purchase worth Rs.9400/- which material was not delivered back to the plaintiffs despite demands. It was the case of the plaintiffs that they were also entitled to recover from defendant No.1 the said sum of Rs.66,000/- and Rs.9400/-.

17. Shri Dessai, learned senior counsel of the plaintiffs submitted that the learned trial Court ought to have decreed the suit at least in the sum of Rs.9400/- which was not paid by the plaintiffs only because the pre-receipt was issued by the plaintiffs. However, we find that defendant No.1 admitted in their para 24 of the written statement with reference to para 24 of the plaint that the cost of the raw material was not Rs.66,000/- but it was around Rs.47,000/-. Likewise the defendant No.1 in its para 25 of the written statement admitted that defendant No.1 was agreeable to pay Rs.9400/- to the plaintiffs against

proper receipts or, in the alternative, defendant No.1 was prepared to deposit the said sum in Court. In our view the learned Trial Court ought to have decreed the suit of the plaintiffs in the sum of Rs.56,400/- since the defendant no.1 had admitted its liability to pay the same to the plaintiffs on account of the raw material taken by the defendant No.1 from the plaintiffs.

18. The case of the plaintiffs was that the contract between the plaintiffs and defendant no.1 got established and concluded after the defendant No.1 accepted the tender submitted by the plaintiffs for the supply of the said cabinets and the same was still subsisting. The case of the plaintiffs was further that the defendant no.1 was not entitled not to place regular orders with the plaintiffs and defendant no.1 could not refuse to honour the contract and obligations arising therefrom vis-a-vis the plaintiffs and that defendant no.1 illegally and dishonestly and in breach and violation of the contract was not placing orders with the plaintiffs for the supply of the said cabinets. Further it was the case of the plaintiffs that in normal course they were entitled to an order from defendant no.1 for the supply of 1000 cabinets per month or at least a minimum of 600 cabinets per month which the defendant no.1 was not doing from April, 1988. The plaintiffs thereafter served a notice on defendant no.1 claiming an amount of Rs.1,44,30,000/- towards loss of profit incurred by them, but in the suit the plaintiffs thereafter restricted their claim to Rs.86,40,000 calculating the same at the rate of Rs.36,000/- per month as damages which they would have suffered for the next 20 years.

18. On the other hand, it was the case of defendant no.1 that the said

notice was published on the Navhind Times for the purpose of enrollment of new additional source and ascertaining of the prevailing market offer value and that the said notice stipulated the eligibility criteria stating that the manufacturers should have suitable facilities for supply of cabinets estimated at the cost of Rs.36 lac per annum, but did not commit that Rs. 36 lac worth of cabinets would be required per annum from a single source. Defendant no.1 denied that the said notice indicated that defendant no.1 warranted cabinets regularly and on permanent basis from a single source like for instance from the plaintiffs. The defendant no.1 further stated that in the said tender notice there was no clause prohibiting other suppliers and there was nothing in the said notice which could fetter the rights of defendant no.1 to take supplies from any other source it deems fit and the said notice did not bar the receipt of cabinets from other sources. The defendant no.1 stated that in the context of this case the contract could be said to have been established only when the purchase order was placed by defendant no.1 and the scope of the contract was restricted to compliance with the said purchase order as and when given. The defendant no.1 stated that the first purchase order itself was the first contract awarded in favour of the plaintiffs. Regarding the third purchase order defendant no.1 stated that the same was meant to regularize the excess quantity already supplied by the plaintiffs. The defendant no.1 also stated that the plaintiffs had sent a letter dated 17.2.1988 stating that if defendant no.1 was not interested in the plaintiffs, the defendant no.1 should liquidate the stock and in response to the said letter that the plaintiffs placed an order for 800 cabinets on 20.2.1988 though there was no obligation on the part of the defendant no.1 to place such an order. The defendant no.1 stated that it was

justified in asking the plaintiffs not to engage skilled workers from other suppliers. The defendant no.1 stated that the anticipation that the plaintiffs would be getting regular purchase orders from defendant no.1 was unfounded and, in fact, by its communication dated 3.3.88 the defendant no.1 had once again cautioned the plaintiffs not to procure excess raw material and that here was no commitment at any time to order 600 cabinets per month. The defendant no.1 further stated that assuming without admitting that there was a contract for further placement of purchase orders for the cabinets that the admitted purchase of materials discharged the said contract as all the stock of the plaintiffs was liquidated as per the request of the plaintiffs by their letter dated 17.2.88.

19. Issues were framed by the learned Trial Court on or about 5.4.94. Subsequently the plaintiffs on or about 4.4.2000 made an application for additional issues being framed, but the same was rejected by the learned Trial Court by Order dated 27.4.2000. The plaintiffs filed a revision petition against the same, to this Court which was dismissed by Order dated 27.4.2000. It appears that the plaintiffs in their written submissions made a request to the Court again to frame additional issues and it is the grievance made by Shri Dessai, the learned senior counsel, that the said request of the plaintiffs was not considered at all by the learned Trial Court.

20. On the other hand, Shri Monte Furtado, the learned counsel of defendant no.1 has submitted that the issue whether there was a concluded contract between the plaintiffs and defendant no.1 entered into in 1987 is an

issue which is inbuilt in issue No.2 as earlier framed and the same has been rightly answered by the learned Trial Court against the plaintiffs.

21. As rightly pointed out by the learned Trial Court while deciding Issue No.2 earlier framed, the crux of the matter was as to what was the contract which the plaintiffs sought to be specifically enforced or for breach of which they claimed damages. The learned Trial Court after considering the evidence led on behalf of the plaintiffs has come to the conclusion that the contract between the plaintiffs and defendant no.1 was limited to only particular orders which were placed from time to time and in our opinion the said finding cannot be faulted. Defendant No.1 had not led any evidence.

22. There can be no dispute that an agreement or a contract can be arrived at between the parties orally. Likewise there can also be no dispute that a contract can be brought about through correspondence or letters exchanged between the parties. In the case at hand, the plaintiffs' case in fact is that the contract be tween the plaintiffs and defendant no.1 was entered into by way of correspondence. The case of the plaintiffs appears to be based on distortion of facts and misconceived perceptions arrived at by the plaintiffs. For example, the plaintiffs pleaded that: “The plaintiffs were informed that the requirement per month of T.V. Cabinets would be around 1000 to 1200 per month and the plaintiffs would be given an order of 600 T.V. Cabinets per months at least. “ However, the letter dated 19.5.1987 (Exh.PW.1/G) written by defendant no.1 clearly mentions that their requirement will not be around 1000 to 1200 numbers of T.V. Cabinets per month. The letter mentions that by considering the other parties they would be in a position to place an order for about 600

numbers T.V. Cabinets per month. As rightly pleaded by defendant no.1, there was no commitment at all in the said letter that at any time Defendant No.1 would order 600 wooden cabinets per month.

23. The case pleaded by the plaintiffs, as already stated was that the contract between the plaintiffs and defendant no.1 was established and concluded after defendant no.1 accepted the tender submitted by the plaintiffs for the supply of the said wooden cabinets. The plaintiffs did not specify by which letter the said contract was concluded. However before the trial Court what was sought to be put forward by the plaintiffs was that the contract was concluded by letter dated 4.7.87 (Exh.PW.1/H) by which the defendant no.1 thanked the plaintiffs for accepting their rate per cabinet as Rs.389.55. However, now before this Court it has been submitted by Shri Dessai, the learned senior counsel that the contract got established after the first order was placed since the first order is a formal expression of the contract which was earlier completed. Shri Dessai has placed reliance on the case of **Tarsem Singh v. Sukhminder Singh** [(1998) 3 S.C.C., 471] in which he Supreme Court has stated that a contract is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter- proposals and also the consideration resulting finally in the acceptance of the proposal. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreement set out in that

document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(h) provides that "an agreement enforceable by law is a contract". Section 2(g) sets out that "an agreement not enforceable by law is said to be void." In our opinion, the decision in the case of **Tarsem Singh v. Sukhminder Singh** (supra) is of no assistance at all to the plaintiffs.

23. In our view none of the three pleas taken from time to time can be accepted to conclude that there was a concluded contract with the Plaintiffs.

24. Generally, a person inviting tenders is under no legal obligation to accept the same. A contract gets concluded only when the tender is accepted and an order is placed. The letter dated 2.5.1987 sent by the plaintiffs (Exh.PW.1/E) only shows that the plaintiffs had quoted their price per cabinet at Rs.392.23 showing their willingness that the said price could be further negotiated. The letter dated 4.7.1987 (PW.1/H) sent by defendant no.1 shows that the rate negotiated at Rs.389.55 was acceptable to t he plaintiffs . However, till then the defendant no.1 had not placed any order with the plaintiffs and the contention of the plaintiffs that the contract was concluded with the said letter dated 4.7.87 appears to be too far fetched. Although the defendant no.1 led no evidence in support of the plea taken by them, the plea taken by defendant no.1 that the said tender notice was issued only to have a list of suppliers who would be willing to supply at a given price appears to be far more probable and plausible. The said notice published by Defendant No.1 was nothing but an invitation for tender which the plaintiffs accepted and offered to supply the cabinets at a price of Rs.389.55. The defendant no.1 could

have certainly ignored the said offer of the plaintiffs by not placing any order with the plaintiffs and there was nothing in law which the plaintiffs could have done regarding the same. Here was a case where the plaintiffs as a supplier had quoted a price of Rs.389.55 for the supply of the said cabinets and it was then the choice of the defendant no.1 either to place the order with the plaintiffs or not. In other words defendant no.1 was under no obligation to place any order with the plaintiffs notwithstanding that they had published the said notice as an invitation for tender and the plaintiffs had tendered the price of Rs.389.55 per cabinet. There was no concluded contract between the plaintiffs and defendant no.1 either when the plaintiffs sent their offer dated 30.6.87 (Exh.PW1/H) or when the defendant no.1 conveyed their approval by letter dated 4.7.87 that the rate of Rs.389.55 was agreeable to them. Th e contract came to be concluded only when the defendant no.1 placed a purchase order with the plaintiffs for the first time and then again from time to time regarding which there is no dispute at all between the parties that any of the orders placed were not duly complied or that there was any breach in complying with the same.

25. In our view, the learned Trial Court was right in concluding that the correspondence between the plaintiffs and defendant no.1 did not result in concluded contract between the plaintiffs and defendant no.1 and that the result of the said correspondence was that the plaintiffs were accepted as one of the suppliers at the agreed rate of Rs.389.55 per cabinet. As already stated, the defendant no.1 placed several purchase orders with the plaintiffs which by and large were duly executed and the plaintiffs were paid for the same. The

terms and conditions of the said purchases were specified on the reverse of the purchase orders and therefore each purchase order was a contract entered into between the defendants on one hand and the plaintiffs on the other hand. The defendant no.1 was within its rights to place orders as per their requirements with the suppliers they chose and deemed fit. The contention of the plaintiffs that they were to be the only supplier was rightly rejected by the learned Trial Court. If there was no concluded contract between the plaintiffs and defendant no.1 by which the plaintiffs were to regularly supply the cabinets to defendant no.1, there can be no breach of any such contract and therefore the plaintiffs could not also be entitled for any damages. As was rightly pleaded by defendant no.1 there was no question of the plaintiffs having suffered any damages at all because even the material which was left with the plaintiffs was ultimately purchased by defendant no.1 once they chose not to place any further orders for the supply of cabinets with the plaintiffs.

26. In view of the above, in our view, the suit of the plaintiffs was rightly dismissed except that the learned Trial Court ought to have decreed the admitted claim in favour of the plaintiffs. Consequently, the appeal deserves to succeed partly . The plaintiffs are held entitled to receive from defendant no.1 the said sum of Rs.56,400/- with interest at the rate of 6% from the date of the suit until payment. The suit of the plaintiffs against defendant No.1 is decreed partly but against the defendant no.2 is hereby dismissed with costs.

P. V. HARDAS, J.

N.A. BRITTO, J.

sl.